United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 8, 2010

TO : Richard L. Ahearn, Regional Director

Region 19

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: AT&T Mobility

Case 19-CA-32363 518-4040-8300

530-6050-7200

CWA Local 37083 (AT&T Mobility) 530-8045-3500

Case 19-CB-10026 536-2570 548-6015

The Region submitted these cases for advice as to whether the Employer violated Section 8(a)(1) and (2) and the Union violated Section 8(b)(1)(A) and (2) by agreeing in advance to apply an existing collective-bargaining agreement to a new group of employees if the Union demonstrated majority support among those employees pursuant to a voluntary recognition/neutrality agreement. We conclude that the Region should dismiss these charges, absent withdrawal, under the Board's long-established rule that parties may lawfully agree to an application-of-contract clause conditioned upon a showing of majority support where, as here, the newly-represented employees are merged into the pre-existing bargaining unit.

FACTS

AT&T Mobility operates a national communications network and has an established collective-bargaining relationship with the Communications Workers of America (CWA or the Union). The parties maintain four regional agreements, including the Western Regional Labor Agreement, effective February 8, 2009 through February 9, 2013 (the Orange Book), which each cover a variety of job classifications in multiple states. Thus, under Article 2 of the Orange Book, the Employer recognizes the Union as the exclusive collective-bargaining representative for employees in CWA Districts 1, 2, 4, 7, 9, and 13, within the job titles listed in Appendix A to the Agreement.

The parties have also negotiated a Memorandum of Agreement Regarding Voluntary Recognition, effective for the same time period, which sets forth procedures for voluntary recognition and requires Employer neutrality during organizing campaigns. That agreement specifies that

"the appropriate units for bargaining" shall continue to be separated into "the following units within each individual State": call centers, inside sales, outside sales, network, and information technology. In addition, Section 2(h) provides that, as soon as possible after recognition, "the newly recognized unit(s) shall be included within the existing and appropriate Labor Agreement between the Union and the Company with respect to wages, hours, and other terms and conditions of employment."

In the spring and summer of 2009, the Union engaged in an organizing campaign among the approximately 135 network employees working at 11 separate locations in Washington State (CWA District 7). The Union distributed authorization cards which expressly stated that if a majority of the employees signed the cards, the Employer would recognize the Union without an election and would bargain with the Union "or apply the collective bargaining agreement which may already cover the bargaining unit in which I am employed."

The Union successfully obtained signatures from a majority of the Washington network employees. Under the procedures set forth in the parties' Memorandum of Agreement, the American Arbitration Association certified the results on September 18, 2009, and the Employer recognized the Union voluntarily. The parties immediately began applying the Orange Book to these employees.

On September 25, the Employer notified the Region of its voluntary recognition of the Union and posted the requisite Dana² notices advising employees of their right to file a decertification petition within a 45-day period. An employee filed an untimely decertification petition in Case 19-RD-3854, but the Regional Director nonetheless issued a Decision and Direction of Election on January 22 because the Dana notice posting had been removed from the petitioner's facility. On February 4, the Union filed a Request for Review of the Regional Director's decision on the grounds that the Board should revisit its decision in Dana Corp. and also that the Regional Director erroneously accepted the late-filed decertification petition. Region proceeded with a mail ballot election on March 12 but has impounded the ballots pending the Board's decision on the Union's Request for Review, which is still pending.

 $^{^{1}}$ Unless otherwise noted, all dates in September through December are in 2009 and from January through March are in 2010.

² See <u>Dana Corp.</u>, 351 NLRB 434 (2007).

In his Decision and Direction of Election, the Regional Director concluded that the appropriate unit in which to hold the election was a unit of Washington network employees. In reaching that result, he stated that the Orange Book and Voluntary Recognition Memorandum "suggest" that the Washington network employees remain a separate bargaining unit. 3 However, the Employer and Union contend that the Washington network employees became part of an existing contractual unit following recognition. Charging Party does not take a contrary position. In fact, the Charging Party's charges allege that the Washington network employees were "accreted" into the larger existing unit covered by the Orange Book. And in response to a direct question on this issue, the Charging Party's counsel confirmed that in the related decertification proceeding, the parties did not dispute that these employees were merged into a larger unit covered by the Orange Book.

ACTION

We conclude that the Region should dismiss the instant charges, absent withdrawal, because the Board has long upheld after-acquired facilities clauses that require the Employer to extend existing agreements to additional groups of employees upon demonstration that the Union enjoys majority support among those employees where, as here, the newly-organized employees are merged into the pre-existing bargaining unit.

Beginning with its decision in Kroger, ⁴ the Board repeatedly has enforced after-acquired facilities clauses, whereby the parties agree to apply an existing contract to a new group of employees that is merged into the pre-existing bargaining unit. The Board held such clauses valid in a series of Section 8(a)(5) cases, finding that the clauses constitute a waiver of the Employer's right to a Board election, so long as the union has a valid card majority among the new group of employees. ⁵ These cases

³ <u>AT&T Mobility, LLC</u>, Case 19-RD-3854, Decision and Direction of Election dated January 22, 2010 at 9-10. This issue is not before the Board on the Union's Request for Review.

 $^{^4}$ See <u>Houston Div. of the Kroger Co.</u>, 219 NLRB 388, 388-89 (1975) (Kroger).

⁵ <u>Ibid.</u> (employer violated Section 8(a)(5) by refusing to honor clause requiring that newly-acquired stores be covered by the existing contract, where union had proof of

essentially carve out an exception to the Section 8(a)(2) prohibition upon pre-recognition bargaining.

The Board has also validated application-of-contract clauses that require the employer to apply the existing collective-bargaining agreement to new bargaining units upon demonstration of majority support in those units, provided that those clauses vitally affect the existing unit employees' terms and conditions of employment. 7 In Lone Star Steel, the Board reasoned that the Kroger Board implicitly had found that after-acquired clauses which extend a collective-bargaining agreement to new facilities that are added to the bargaining unit are mandatory subjects of bargaining and thus that they necessarily "vitally affect" existing unit employees' terms and conditions of employment. 8 On the other hand, an application-of-contract clause that extends an existing collective-bargaining agreement to employees who will remain in a separate unit constitutes a mandatory subject of bargaining only when it "vitally affects" unit employee terms and conditions. 9 In Lone Star, the Board held that

card majorities in those stores); Alpha Beta Co., 294 NLRB 228, 229-30 (1989) (same); Goldsmith-Louison Cadillac Corp., 299 NLRB 520, 522 (1990) (same); Raley's, 336 NLRB 374, 375-78 (2001) (remanding for further proceedings to determine whether union had majority support).

⁶ See <u>Majestic Weaving Co.</u>, 147 NLRB 859, 860 (1964), enf. denied 355 F.2d 854 (2d Cir. 1966) (employer violated Section 8(a)(2) by negotiating contract with minority union even though execution of the contract was conditioned upon the union achieving majority support).

⁷ See, e.g. United Mine Workers of America, 231 NLRB 573, 576 (1977) (Lone Star Steel), enf. denied in pertinent part sub nom. Lone Star Steel Co. v. NLRB, 639 F.2d 545 (10th Cir. 1980), cert. denied 450 U.S. 911 (1981) (dismissing Section 8(b)(3) complaint based upon union's insistence on application-of-contract clause); United Mine Workers of America Local 1854, 238 NLRB 1583, 1589-90 (1978), enf. denied in pertinent part sub nom. Amax Coal Co. v. NLRB, 614 F.2d 872 (3d Cir. 1980), revd. on other grounds 453 U.S. 322 (1981) (same); Promenade Garage Corp., 314 NLRB 172, fn. 1, 182-83 (1994) (holding employer violated Section 8(a)(5) by failing to honor clause requiring application of contract to new unit).

⁸ 231 NLRB at 576.

 $^{9 \}text{ } \underline{\text{Id.}}$ at 575-76 (emphasis in original).

such a clause was a mandatory subject because it served to protect unit jobs and work standards by discouraging transfers of work to nonunit employees. 10 The Board will not enforce an after-acquired or application-of-contract clause, however, where it is not clear that the additional facilities will become part of the same unit as the facilities covered by the existing contract and there is no evidence that the clause vitally affects the unit employees. 11

Although the Board developed these principles in Sections 8(a)(5) and 8(b)(3) cases, we have previously concluded that they apply as well to Sections 8(a)(2) and 8(b)(1)(A) allegations; the Board would not require compliance with or permit bargaining to impasse upon a clause that is unlawful under Section 8(a)(2) or Section 8(b)(1)(A). 12 Accordingly, we will apply those principles here in the following manner. If the parties contemplated that a unit in which the Union was newly recognized would be merged into the pre-existing unit covered by the Orange Book, then the parties' application-of-contract clause is lawful under Kroger. On the other hand, if the parties intended to treat the new units as separate from the preexisting unit covered by the Orange Book, then the application-of-contract clause is only lawful if it vitally affects the interests of the pre-existing unit employees.

We conclude that the parties intended to merge the Washington network employees into the pre-existing Orange Book unit. The language contained in Section 2 of the parties' Memorandum of Agreement Regarding Voluntary Recognition is ambiguous and can be read to suggest the Washington network employees would remain a separate unit

¹⁰ Id. at 576. See also Pall Biomedical Products Corp., 331 NLRB 1674, 1676-77 (2000), enf. denied 275 F.3d 116 (D.C. Cir. 2002) (employer violated Section 8(a)(5) by revoking agreement to recognize union at additional facility if unit work was performed at that facility, regardless of whether the two groups of employees would be in the same or different units, because employees performing unit work at additional facility vitally affected the existing bargaining unit).

¹¹ See <u>Supervalu, Inc.</u>, 351 NLRB 948, 951-53 (2007) (dismissing Section 8(a)(5) complaint because clause was permissive subject of bargaining).

¹² See, e.g., <u>Tenet Healthcare</u>, <u>Inc. d/b/a Los Gatos</u> <u>Community Hospital</u>, Cases 32-CA-21266-1 et al., Advice <u>Memorandum dated July 9</u>, 2004 at 7.

after voluntary recognition was granted. Alternatively, that same language can be read as limited to the recognition phase and not a bar to subsequent merger of those employees into the pre-existing unit. More importantly though, the Employer and the Union have both taken the position that their intention was to merge the newly-recognized unit into the pre-existing unit. And the Charging Party adopts this interpretation.

Further, this conclusion is not inconsistent with the Regional Director's determination in the related RD case that the appropriate unit for the purposes of the decertification election was the Washington network employees unit in which voluntary recognition was extended. As the Regional Director noted in his Decision and Direction of Election, it is "well-established Board law that a decertification election must almost always be held in a unit coextensive with the recognized ... unit." That does not preclude the parties from agreeing, as they have here, to subsequently merge that unit into the pre-existing unit. 14

Moreover this conclusion does not mean, [FOIA Exemption 5], that any time that an existing contract is applied to a newly recognized unit, that unit is merged into the unit already covered by the contract. For the Kroger exception to attach, evidence must establish the parties' intention to merge the units. And Lone Star,

¹³ AT&T Mobility, LLC, Case 19-RD-3854, Decision and Direction of Election at 9. Similarly, in the Kroger line of cases, the Board required a showing of majority support among the employees of the after-acquired facility even though that facility was to be merged into the pre-existing unit. See, e.g., Raley's, 336 NLRB at 378 (remanding case for proof of majority status in the additional stores); Kroger, 219 NLRB at 388 (relying upon union's offer of proof that it held card majorities "at the stores in issue").

¹⁴ In a subsequent case involving the same parties, voluntary recognition agreement, and collective-bargaining agreement with respect to retail employees in Alaska, the Regional Director found that "even assuming a merger had taken place[,]" the <u>Dana</u> election should be held in the recognized unit. He expressly noted that this finding "does not address merger" outside of the <u>Dana</u> context. See <u>AT&T Mobility, LLC</u>, Case 19-RD-3860, Decision and Direction of Election dated April 16, 2010 at 6.

 $^{^{15}}$ See Kroger, 219 NLRB at 388.

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which contemplates application of a contract to an independent unit, further demonstrates the [FOIA Exemption 5] is not the case. 16

Since the Washington network employees were merged into the Orange Book bargaining unit, the parties' application-of-contract clause is lawful under <u>Kroger</u> and its progeny. Accordingly, the Region should dismiss the instant charges, absent withdrawal.

B.J.K.

 $^{^{16}}$ See Lone Star, 231 NLRB at 576.

¹⁷ See cases cited in fn. 5, supra.